IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.01.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

Writ Petition Nos.12283 to 12285 of 1998

M/s.M.M.Rubber Company Limited
No.748, Mount Road
Chennai - 600 002.
rep.by its Managing Director — Petitioner in all the W.Ps.

v.

1. The Union of India
   Ministry of Finance
   rep.by its Secretary
   North Block, New Delhi

2. The Commissioner of Central Excise
   No.121, Uthamar Gandhi Road
   Chennai - 600 034.

3. The Customs, Excise and Gold
   (Control) Appellate tribunal
   Shastri Bhawan Annexe
   (I Floor), 26, Haddows Road
   Chennai - 600 006. — Respondents in all the W.Ps.

Writ Petitions are filed under Article 226 of the Constitution of India for the issue of writ of certiorari as stated within.

For petitioner : Mr.Habibullah Badsha,
Senior Counsel, for
Mr.Raju K.Lucose

For Respondents : Mr.V.R.Rajasekaran,
ACGSC

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ORDER

The petitioner filed the above writ petitions seeking for the following reliefs:

> Writ Petition NO.12283 of 1998 is filed for the issuance of writ of certiorari to call for the records of the third respondent and quash the order No.210/98 dated 26.12.1997 in so far as it relates to the finding that there are no merits in the plea that the show cause notice could not have been issued by the second respondent since the assessments were provisional.
>
> Writ Petition NO.12283 of 1998 is filed for the issuance of writ of declaration to declare that the order dated 26.12.1997 passed by the third respondent is invalid.
>
> Writ Petition NO.12285 of 1998 is filed for the issuance of writ of declaration to declare that the assessments were provisional when the order dated 10.6.1987 was passed by the second respondent and that when the assessments were provisional, the order dated 10.6.1987 passed by the second respondent is invalid.

2. The facts of the case as culled out from the pleadings are as follows :

The petitioner company is manufacturer of latex foam rubber goods, having their factories at Madras and Bangalore and are having several duty paid sales depots all over the country and are selling the goods at uniform price on declaration to the Central Excise Department in proper form. On 29.11.1985 the Department of Revenue Intelligence raided the factories of the petitioner at Chennai and Bangalore, and the sales offices at Chennai, Hyderabad, Bangalore and Kottayam. After the raid and on the basis of the raid so conducted, a show cause notice dated 25.03.1986 was issued proposing to make a demand for Rs.2,39,00,000/- being the revaluation of the petitioner's production on the sales price of Tranquil Rubber Sales Ltd., who is one of the dealers of the petitioner. The second respondent, the Commissioner of Central Excise, Chennai, after adjudication by giving a personal hearing to the petitioner quantified the differential central excise duty at Rs.1,89,63,126.33 for clearance made from 01.03.1981 to 31.05.1985 under the proviso to Section 11-A of the Central Excise Act and imposed a penalty of Rs.1,14,00,000/- under Rule 173Q of the Central Excise Rules and redemption fine in a sum of Rs.1,24,000/- was imposed by order dated 10.06.1987.

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3. Aggrieved by the order of the second respondent the petitioner filed an appeal before the CEGAT, the third respondent on 22.07.1987. While that being so, pursuant to the format order passed by the Supreme Court in the case of Union of India v. Bombay Tyre International Ltd., Civil Appeal No.2269 of 1980 dated 09.05.1983 with regard to the post manufacturing expenses element, the Assistant Commissioner passed an order on 11.04.1989. The petitioner in the pending appeal before the third respondent took out an application for raising additional ground on the basis of the order passed by the Assistant Commissioner on 11.04.1989. The third respondent after hearing the submission of the parties passed an order on 26.11.1997. In that order the two members of the third respondent rejected the plea of the petitioner that the assessments were provisional. However, in respect of other points that were argued by the petitioner, the members of the third respondent have expressed different opinions and the matter was referred to a third member for deciding the point of differences so as to arrive at a majority decision by the third respondent. In this writ petition, the order of the third respondent rejecting the plea of the petitioner that the assessment were only provisional has been put in issue.

4. Learned senior counsel contended that the second respondent had no jurisdiction to invoke section 11A nor the proviso to the said section, when the assessment of levy of excise duty during the relevant period was only provisional. Hence, the order passed by the second respondent is one without jurisdiction. The order of the second respondent dealt with the period from 01.03.1981 to 31.05.1985. The price list filed as provisional was provisionally assessed. The second respondent proceeded on the basis that the assessments were final, when they were only provisional. The order of the Assistant Commissioner passed on 11.04.1989 has approved the ex factory price shown in the price list filed by the petitioner in respect of the products.

5. In counter to the above argument, it is the contention of the respondent that the finalisation of the provisional assessment by the Assistant Commissioner has been made during 1989 with regard to the valuation disputes on account of post manufacturing expenses elements such as freight expenses on finished goods, octroi on finished goods, distribution expenses, packing charges etc., on the basis of the supreme Court order in Bombay Tyre International case. The finalisation of the provisional assessment by the Divisional Assistant Commissioner by his order dated 11.04.1989 is in no way related to the impugned demand notice wherein the subject matter of the dispute is under-valuation of excisable goods by the petitioner company by marketing through their related persons. The petitioner having submitted to the jurisdiction of the second respondent and having suffered an order of adjudication and filed a further appeal to the third respondent, cannot now put in issue the jurisdiction of the second respondent in a writ petition.

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6. Heard the learned counsel on either side and perused the materials available on record.

7. Admittedly, the second respondent, on the basis of the materials gathered during the search and raid of the petitioner's factory premises and the premises of its dealers has initiated proceedings under the provisions of the Central Excise Act and an adjudicated order has been passed.

8. The correctness of the said order was canvassed before the third respondent. The Tribunal by its order dated 26.12.1997 though rejected the plea of the petitioner that the assessments were only provisional, differed in respect of the other grounds and referred the matter to the third member so as to arrive at a majority decision. Hence, as on date, no enforceable order has been passed by the Tribunal, though in certain points in issue opinion has been expressed by the Tribunal. The order which is impugned in this writ petitions can only be regarded as an expression of opinion by the members and the matter has been referred to a third member so as to have a majority opinion, for an enforceable order. Unless an order is passed by the third member on the reference made, the order made by the Tribunal cannot be regarded as an enforceable final order. The petitioner having elected to approach the Tribunal by filing an appeal and having participated in the appeal, by advancing arguments in full by filing additional grounds, ought to have allowed the Tribunal to pass an enforceable order. Instead, finding that certain opinion expressed in the referral order is against it, the petitioner filed the present writ petitions and thereby stalled the Tribunal from passing an enforceable order. This Court is not oblivious of the power of the Court under Article 226 of the Constitution of India to entertain the writ petition in order to render justice notwithstanding availability of any statutory remedy or other alternative remedy, on satisfying that unless writ jurisdiction is invoked, the petitioner's interest would be jeoparadised. But that is not the attended situation to the present case. It is well open to the petitioner, if it is so advised or if such a situation or contingency arises, to question the correctness of the order to be passed by the Tribunal, the third respondent on the reference.

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9. The matter is pending before this court for nearly ten years and the Tribunal was not allowed to proceed further because of the pendency of these writ petitions. Hence, the writ petitions are

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dismissed and the Tribunal is directed to pass orders on the reference made by the order of the Tribunal as expeditiously as possible, having regard to the fact that the matter is pending before it for nearly a decade.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Secretary,
   Union of India
   Ministry of Finance
   North Block, New Delhi

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   (Control) Appellate tribunal
   Shastri Bhawan Annexe
   (I Floor), 26, Haddows Road
   Chennai - 600 006.

+1cc to Mr.P.Wilson, Advocate Sr 1765
+2ccs to Mr.K.Raju Lucose Sr 1672

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KSJ (CO)
km/18.1.

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